SUPREME COURT, U. S.

FILED

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NO. 1269

IN THE

Supreme Court of the United States

October Term, 1968

RICHARD L. DUGGER, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:
JAMES R. WATSON
Scanlan Building
Houston, Texas 77002

RICHARD L. DUGGER
Petitioner Pro Se

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Richard L. Dugger prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit affirming a summary judgment adverse to him granted by the District Court of the United States for the Southern District of Texas, wherein the plaintiff Dugger, a veteran reemployed pursuant to the Universal Military Training and Service Act (50 U.S.C. App. §459) was denied paid vacations in the years 1965 and 1966 claimed by him from the defendant employer, Missouri Pacific Railroad Company.

OPINIONS BELOW

An opinion was rendered by the District Court which has been published and was referred to in the *per curiam* opinion of the Court of Appeals. *Dugger v. Missouri Pacific Railroad Company*, D.C. S.D. Tex. 1967, 276 F. Supp. 496. The opinion of the Court of Appeals was entered on December 3, 1968 and has not yet been published. The opinion of the Court of Appeals denying the Petition for Rehearing was entered on January 24, 1969 and has not yet been published. The first of these opinions appears in the record and the latter two opinions in the official transcript filed with the papers in this petition (Tr. 168-169 and 179-180 respectively).

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1968, and the order overruling the appellant's petition for rehearing was entered on January 24, 1969. The jurisdiction of this Court is invoked under §1254(1) and §2101(c), Title 28, United States Code.

QUESTIONS PRESENTED

Whether, under the Universal Military Training and Service Act, as amended and as construed by this Court in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966) and *Eagar, et al v. Magma Copper Co.*, 389 U.S. 323 (1967), a returning veteran is entitled to a paid vacation when the collective bargaining contract under which he works specifies that an employee must have performed 110 days of "compensated service" during the year previous to that in which the vacation is to be granted and when the veteran is unable to perform such compensated

service by reason of having been on active military duty during such preceding year.

STATUTE INVOLVED

Act of June 24, 1948, c. 625, Title I, §9, 62 Stat. 614, as amended, Title 50 App. U.S.C.A. §459:

* * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for re-employment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay;

* * *

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was

inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

* * *

(g) (4) Any employee not covered by paragraph (3) of this subsection who holds a position described in paragraph (A) or (B) of subsection (b) of this section shall upon request be granted a leave of absence by his employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon his release from a period of such active duty for training or inactive duty training, or upon his discharge from hospitalization incident to that training, such employee shall be permitted to return to his position with such seniority, status, pay, and vacation as he would have had if he had not been absent for such purposes. . . ."

STATEMENT OF THE CASE

The trial court stated the facts regarded as controlling as follows (R. 160-161):

> "Dugger began working for the Missouri Pacific Railroad Co. in 1962, as a machinist apprentice at defendant's Settegast Diesel Shop in Houston, Texas. At that time there was in effect a labor agreement between defendant and its employees which, in part, provided as follows:

> Effective with the calendar year 1961, an annual vacation of ten (10) consecutive days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred ten (110) days during the preceding calendar year and who has three (3) or more years of continuous service. . . .

"Plaintiff rendered a sufficient amount of compensated service in 1962 to entitle him to a paid vacation in 1963. Although Dugger entered the military service in August, 1963, he performed enough compensated service in that year to earn a paid vacation in 1964, for which he was paid. Plaintiff did not perform any compensated service for the defendant in 1964.

"Dugger was discharged from the military service on July 31, 1965 and returned to his former position with the defendant on September 1, 1965. Due to the fact that plaintiff did not return to work until September of 1965, he was able to work only eighty-five (85) compensated days by the end of the calendar year. Treating Dugger as one who had been on furlough or leave of absence, defendant reasoned that he had failed to work the required period of time in 1964 and 1965 to entitle him to a paid vacation in 1965 and 1966."

At the time when the trial court granted defendant's motion for summary judgment, this Court had already decided *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966), but had not yet decided *Eagar, et al v. Magma Copper Co.*, 389 U.S. 323 (1967). The trial court relied upon the decision of the Court of Appeals for the Ninth Circuit, sub. nom. *Magma Copper Company v. Eagar*, 380 F.2d 318 (C.A. 9, 1967), and distinguished this Court's decision in *Accardi*, as had the Court of Appeals

in *Magma*. This Court later summarily reversed *Magma*, citing *Accardi. Eagar, et al v. Magma Copper Co.*, 389 U.S. 323 (1967). Still later, the Court of Appeals by its brief *per curiam* opinion in substance adopted the opinion of the District Court without discussing or even mentioning the effect of this Court's later decision in *Magma* upon the reasoning behind the District Court's decision.

REASONS FOR GRANTING THE WRIT

In *Accardi, supra,* this Court held without qualification that "the failure to credit petitioners' 'compensated service' time with the period spent in the armed services does not accord petitioners the right to be reinstated 'without loss of seniority' guaranteed by §§8(b)(B) and (c) [of the Selective Training and Service Act of 1940]." This Court has never subsequently qualified this holding, and in *Eagar, et al v. Magma Copper Company,* 389 U.S. 323 (1967), decided that the principle stated applies to vacation benefits as well as to the severance benefit involved in *Accardi.*

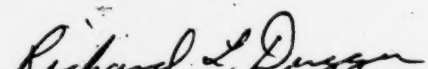
There have since been conflicting decisions in the courts below. In the case at bar, the holdings in *Accardi* and *Magma* have been interpreted restrictively to deny benefits to the petitioner. In other decisions, e.g. *Kelly v. C.R.I. & P. R. Co.*, 293 F. Supp. 423 (W.D. Okla., 1968), on all fours with the case at bar, the decision in *Magma* has been given its natural force and effect, and recovery allowed.

While the sums of money involved in each case may be relatively small, the question presented is of wide general interest. As the respondent-appellee pointed out

below, the position taken by the railroad is based upon their interpretation of a national agreement. The conflict between the rights granted plaintiff-petitioner by the Act and the railroad's interpretation of the contract potentially affects any veteran returning to railroad employment in the classes covered by the agreement. If the natural effects of *Accardi* and *Magma* are to be restricted as has been done in the case at bar, it should be done by this Court and not left to the various and conflicting decisions which have come forth below. Otherwise, the petitioner and the many others in his class should receive the benefits which are their due.

CONCLUSION

For the reasons stated, the decisions below should be reversed.



RICHARD L. DUGGER
Petitioner Pro Se

Of Counsel:

JAMES R. WATSON
Scanlan Building
Houston, Texas 77002

APPENDIX A

(Caption Omitted)

OPINION OF COURT OF APPEALS

(December 3, 1968)

Before JONES and COLEMAN, Circuit Judges, and CHOATE, District Judge.

PER CURIAM: The appellant, Richard L. Dugger, brought an action against his employer, Missouri Pacific Railroad Company, claiming vacation pay under Section 9 of the Universal Military Training and Service Act, 50 U.S.C.A. Sec. 459. The district court concluded that any right to vacation pay must depend upon the terms of the labor agreement between the railroad and its employees. Under this agreement, the district court decided, no vacation pay should be awarded. *Dugger v. Missouri Pacific Railroad Company,* D.C. S D. Tex. 1967, 276 F. Supp. 496. From the district court judgment Dugger has appealed. The decision of the district court is sound and its judgment should be and is

AFFIRMED.

APPENDIX B

(Caption Omitted)

OPINION ON PETITION FOR REHEARING

(January 24, 1969)

Before JONES and COLEMAN, Circuit Judges, and CHOATE, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

(Caption Omitted)

JUDGMENT OF DISTRICT COURT REPORTED 276 F. SUPP. 496

(Filed Nov. 20, 1967)

The plaintiff instituted this suit against his employer, Missouri Pacific Railroad, to recover damages for vacation benefits he asserts that he is entitled to under the Universal Military Training and Service Act, 50 U.S.C. App. §459. The cause is before the court on defendant's motion for summary judgment. The facts are not in dispute.

Dugger began working for the Missouri Pacific Railroad Co. in 1962 as a machinist apprentice at defendant's Settegast Diesel Shop in Houston, Texas. At that time there was in effect a labor agreement between defendant and its employees which, in part, provided as follows:

> Effective with the calendar year 1961, an annual vacation of ten (10) consecutive days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred ten (110) days during the preceding calendar year and who has three (3) or more years of continuous service. . . .

[125] Plaintiff rendered a sufficient amount of compensated service in 1962 to entitle him to a paid vacation in 1963. Although Dugger entered the military service in August, 1963, he performed enough compensated service in that year to earn a paid vacation in 1964, for which he was paid. Plaintiff did not perform any compensated service for the defendant in 1964.

Dugger was discharged from the military service on July 31, 1965 and returned to his former position with the defendant on September 1, 1965. Due to the fact that plaintiff did not return to work until September of 1965, he was able to work only eighty-five (85) compensated days by the end of the calendar year. Treating Dugger as one who had been on furlough or leave of absence, defendant reasoned that he had failed to work the required period of time in 1964 and 1965 to entitle him to a paid vacation in 1965 and 1966.

There is no dispute between the parties that had Dugger been absent from work in 1964 and 1965 for reasons other[1] than military service, he would not have been entitled to a paid vacation in 1965 and 1966. Plaintiff, however, asserts that irrespective of the terms of the labor agreement, he was entitled to a paid vacation in each of these years under the provisions of the Universal Military Training and Service Act, 50 U.S.C. App. §459.[2]

There is no genuine issue as to any material fact. The issue before the court is whether defendant is entitled to a judgment as a matter of law. Fed. R. Civ. P., Rule 56.

The Universal Military Training and Service Act provides that if a person leaves a position with a private employer because he is inducted into the armed forces for training and service, and upon discharge from the armed forces is qualified [126] to perform the duties for the private employer, he shall "be restored by such employer

1. This statement serves for illustration and does not mean that there were no excusable absences under the agreement.

2. Plaintiff has admitted that in all other respects he has received the treatment, pay, and benefits appropriate to his class and craft.

. . . to such position or to a position of like seniority, status, and pay. . . ." Section 459(b)(B)(i). Section 459(c)(1) further provides that if the person is restored to such a position, he:

> shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be restored without loss of seniority, *shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practice relating to employees on furlough or leave of absence* in effect with the employer at the time such person was inducted into such forces. . . .[3] (Emphasis added.)

The only provision in the labor agreement which related to vacation credit of an employee who had been in the armed forces provided that an employee who either worked seven months or performed service sufficient to qualify him for a vacation in the year prior to becoming a member of the armed forces was entitled to a credit of the time spent with the armed forces in determining the *length* of vacations for which he would qualify upon his return.[4]

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3. Section 459(c)(2) continues to say;
[A]ny person who is restored to a position . . . should be so restored in such a manner as to give him such *status* in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.
(Emphasis added.)
This paragraph is inapplicable to the case at hand, for the dispute does not concern Dugger's *status*. See Bozar v. Central Penn. Quarry, Stripping & Constr. Co., 73 F.Supp. 803, 810, 813 (M.D. Penn. 1947).

4. The vacation provisions were scaled to the number of years the employee had worked for the railroad. It will be seen later that this clause has no application to the issue in controversy.

Plaintiff argues that the Act requires that a veteran be treated as though he had worked for the employer continuously during the period of his service in the armed forces.[5] If, he says, the labor agreement were applied to veterans independent of this Act, the result would be to discriminate against veterans. This, the plaintiff contends, is exactly what the Act was designed to avoid. In effect, Dugger takes the position that the Act requires the employer to treat a returning veteran as though he had remained with the railroad and had performed a sufficient amount of service to earn a paid vacation for the year of his return and the following year.

Vacation rights of the sort being claimed by plaintiff [127] have been classified as "other benefits" in which the veteran is entitled to participate under Section 459(c)(1). *Magma Copper Co. v. Eagar*, 380 F.2d 318, 321 (9th Cir. 1966); *Siaskiewicz v. General Electric Co.*, 166 F.2d 463, 466 (2d Cir. 1948);[6] Annot *Re-employment of*

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5. This argument was expressly rejected in Siaskiewicz v. General Electric Co., 166 F.2d 463, 465 n.4 (2d Cir. 1948).

6. Plaintiff vigorously asserts Accardi v. Pennsylvania R.R. Co., 383 U.S. 225 (1966), as support for his position. *Accardi* brings to light the distinction between the seniority aspect (length of vacation relative to length of service) of vacation privilege and the employee's right to a paid vacation at all. *Accardi* deals with the seniority aspect and did not deal with vacation rights as "other benefits." See *Magma*, 380 F.2d at 321-22. In fact, the labor agreement in effect is the case at hand provided for the *Accardi* situation.

Plaintiff also argues that amended section 459 (g)(4) is applicable, at least in spirit, to this case. That subsection provides that the returning employee shall have such "seniority, status, pay, and vacation as he would have if he had not been absent for such purpose." Subsection (g)(4) differs from subsection (c)(1) in that (g)(4) is designed for persons granted a leave of absence to perform active or inactive training in the armed forces.

Section 459 has been amended several times subsequent to the decisions herein cited, and Congress must have been aware of the

Veterans, 29 A.L.R. 2d 1279, 1324-27 (1953). Dugger is entitled to participate in vacation rights to the extent that they are "offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence. . . ." Section 459 (c)(1). Thus, Dugger, as a returning veteran, is not entitled to vacation rights which non-returning veteran employees on leave of absence could not receive. *Borges v. Art Steel Co.,* 246 F.2d 735, 738 (2d Cir. 1957); *Dougherty v. General Motors Corp.,* 176 F.2d 561 (3d Cir. 1949). In the case at hand, the labor agreement represents the railroads "established rules and practices relating to employees on furlough or leave of absence. . . ."

Under the terms of the labor agreement, if an employee rendered fewer than 110 days of compensated service in the year preceding because he was on leave of absence, he would not be entitled to a paid vacation. The agreement contained no provision which would excuse a returning veteran from satisfying this requirement. In order to receive a paid vacation in 1965 and 1966, therefore, Dugger was required to render 110 days of compensated service in 1964 and 1965, respectively.

It is undisputed that Dugger did not work 110 days either in 1964 or 1965. As a matter of law, therefore, plaintiff was not entitled to a paid vacation in 1965 and 1966. This interpretation places veterans and non-veteran employees on a parity, as required by the Act; to make an exception for returning veterans would be to discriminate against non-returning veterans.

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construction the courts were giving section 459 (c)(1). Had Congress intended the language of subsection (g) (4) to apply to subsection (c) (1), it could have specifically so provided. Compare Commissioner v. Reynolds, 313 U.S. 428, 432 (1941); Sherman v. Hamilton, 295 F.2d 516 (1st Cir. 1961), *cert. denied,* 369 U.S. 820 (1962).

Plaintiff's argument that the Act does not forbid such discrimination undoubtedly is correct, but this labor agreement did not so provide. Defendant's employees or elected officials [128] could have bargained to have such an exception included in the labor agreement. This, however, was not done, and Congress did not intend to take the employees' position at the bargaining table. The courts also have been careful not to invade the sanctity of labor-management relations. See *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964); *Trailmobile Co. v. Whirls,* 331 U.S. 40, 59, 61 (1947).

There is no genuine issue as to any material fact, and defendant is entitled to a judgment as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED

(a) that defendant's motion for summary judgment is granted;

(b) that the cause is hereby dismissed; and

(c) that each party shall bear and pay its costs incurred herein.

The Clerk shall file this Memorandum and Order, which is a final judgment, and mail true and correct copies to counsel of record.

DONE this 20th day of November, 1967.

JAMES NOEL
United States District Judge